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No. _____

IN THE

Supreme Court of the United States

October Term, 1984

HOWARD L. MOON
Petitioner

vs.

SECRETARY, U. S. DEPARTMENT OF LABOR
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Howard L. Moon
1407 Cabin Creek Trail
Griffin, Georgia 30223
(404) 228-8050
Petitioner

85 PP

QUESTION PRESENTED

Whether the Department of Labor's Employment Standards Administration Office of Federal Contracts and Compliance Programs (OFCCP) has, or should exercise, authority to enforce section 503 of the Rehabilitation Act of 1973, or is this left to the discretion of the Regional Solicitor of Labor (RSOL).

LIST OF PARTIES WHOSE JUDGEMENT IS SOUGHT TO BE REVIEWED

1. U. S. Court of Appeals, for the Eleventh Circuit, Atlanta, Ga.
2. U. S. District Court, Atlanta, Ga.
3. Director of OFCCP, Washington, D. C.
4. Regional OFCCP Office, Atlanta, Ga.
5. Regional RSOL Office, Atlanta, Ga.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. _____

HOWARD L. MOON — Petitioner

vs.

SECRETARY, U. S. DEPARTMENT
OF LABOR — Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Howard L. Moon, on behalf of himself, (and millions of qualified handicapped individuals) prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered November 26, 1984.

OPINIONS BELOW

The opinions of the Court of Appeals (Appendix A., *infra*, 1a-14a) is reported at 747 F.2d 599 (11th Cir. 1984). The District Court Order denying in part the Secretary's Motion to dismiss, but refusing mandamus (Appendic C, *infra*, 17a-26a) is reported at ___ EPD 33, 402. The District Court Order to dismiss is in Appendix D, *infra*, 27a-33a.

JURISDICTION

The judgment of the court of appeals (Appendix B, *infra*, 15a-16a) was entered on November 26, 1984. The jurisdiction of the Court is invoked under 28 U.S.C. 1254 and Park V of the Rules of the Court.

CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATUTORY PROVISIONS

Rehabilitation Act of 1973
29 U.S.C. 793

Sec. 503. (a) Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including

construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 7(6). The provisions of this section shall apply to any subcontract in excess of $2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States. The President shall implement the provisions of this section by promulgating regulations within ninety days after the date of enactment of this section.

(b) If any handicapped individual believes any contractor has failed or refuses to comply with the provisions of his contract with the United States, relating to employment of handicapped individuals, such individual may file a complaint with the Department of Labor. The Department shall promptly inmvestigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract the laws and regulations applicable thereto.

(c) The requirements of this section may be waived, in whole or in part, by the President with respect to a particular contract or subcontract, in accordance with guidelines set forth in regulations which he shall prescribe, when he determines that special circumstances in the national interest so require and states in writing his reasons for such determination.

REGULATORY PROVISIONS

(Fed. Reg. Vol. 41, NO. 75, pages 16147 through 16155 April 16, 1976)

CHAPTER 60 - OFFICE OF FEDERAL CONTRACT COMPLIANCE, EQUAL EMPLOYMENT OPPORTUNITY, DEPARTMENT OF LABOR

PART 60-741 - AFFIRMATIVE ACTION OBLIGATION OF CONTRACTORS AND SUBCONTRACTORS FOR HANDICAPPED WORKERS.

Redesignation

On June 11, 1974, the Department of Labor published regulations (39 F.R. 20566) implementing section 503 of the Rehabilitation Act of 1973, Public Law 93-112, which required government contractors and subcontractors to take affirmative action to employ and advance in employment qualified handicapped individuals. Although the regulations were effective on the date of publication, interested persons were encouraged to submit comments. Those comments have been reviewed and analyzed.

10. The evaluation section authorized investigations by the Director of OFCCP to determine compliance as well as evaluations of agency performance.

11. In view of the foregoing amendment regarding investigations, the Department will require compliance agencies to conduct investigations from time-to-time at the request of the Director to ensure that contractors in the agencies' assigned industries are fully cognizant of their obligations under the Act and this Part, and to report to the Director any information which comes to their attention that contractors are not in compliance therewith. Other modifications in the hearing procedures are made consistent with this amendment.

12. (Paragraph 2) In view of the fact that responsibility for enforcement of section 503 of the Rehabilitation Act of 1973 has been placed in the Office of Federal Contract Compliance Programs and all other OFCCP regulations are contained in Title 41 CFR, Chapter 60, for administrative convenience and clarity the regulations governing the affirmative action obligations of contractors and subcontractors for handicapped workers formerly found in 20 CFR Part 741 are redesignated as Part 60-741 or 41 CFR.

Subpart A - Preliminary Matter,
Affirmative Action Clause, Compliance

60-741.1 Purpose and application

The purpose of the regulations in this Part is to assure compliance with section 503 of the Rehabilitation Act of 1973, which requires government contractors and subcontractors to take affirmative action to employ and advance in employment qualified handicapped individuals. The regulations in this Part apply to all government contracts and subcontracts for the furnishing of supplies or services or for the use of real or personal property (including construction) for $2,500 or more. Compliance of a contractor with the provisions of this Part will not necessarily determine its compliance with the requirements of section 504 of the Rehabilitation Act of 1973 and compliance with section 504 will not necessarily determine compliance with section 503 and the regulations in this Part.

60-741.2 Definitions.

"Agency" means any contracting and/or compliance agency of the government.

"Compliance Agency" means any agency which the Director requests to conduct investigations and such other responsibilities in connection with the administration of the Act as the Director may request, as appropriate, includ-

ing the responsibility to ensure that contractors are fully cognizant of their obligations under the Act and this Part and to provide the Director with any information which come to its attention that the contractor is not in compliance with the Act or this Part.

"Qualified handicapped individual" means a handicapped individual as defined in 60-741.2 who is capable of performing a particular job, with reasonable accommodation to his or her handicap.

"Rules, regulations, and relevant orders of the Secretary of Labor" as used in paragraph (b) of the affirmative action clause means rules, regulations, and relevant orders of the Secretary of Labor or his or her designee issued pursuant to the Act.

60-741.4 Affirmative Action Clause.

Each agency and each contractor and subcontractor shall include the following affirmative action clause in each of its covered government contracts or subcontracts (and modifications, renewals, or extensions thereof if not included in the original contract).

Affirmative Action for Handicapped Workers

(a) The contractor will not discriminate against any employee or applicant for employment because of physical or mental handicap in regard to any position for which the employee or applicant for employment is qualified. The contractor agrees to take affirmative action to employ, advance in employment and otherwise treat qualified handicapped individuals without discrimination based upon their physical or mental handicap in all employment practices such as the following: employment, upgrading, demotion or transfer, recruitment, advertising, layoff or termination, rates of pay or other

forms of compensation, and selection for training, including apprenticeship.

(b) The contractor agrees to comply with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the Act.

(c) In the event of the contractor's noncompliance with the requirements of this clause, actions for noncompliance may be taken in accordance with the rules, regulations and relevant orders of the Secretary of Labor issued pursuant to the Act.

60-741.6 Affirmative action policy, practices and procedures.

(a) *General requirements.* Under the affirmative action obligation imposed by section 503 of the Rehabilitation Act of 1973, contractors are required to take affirmative action to employ and advance in employment qualified handicapped individuals at all levels of employment, including the executive level. Such action shall apply to all employment practices, including, but not limited to, the following: hiring, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.

60-741.24 Duties of agencies.

(a) *General responsibility.* Each agency shall cooperate with the Director in the performance of his or her responsibilities under the Act. Such cooperation shall include the responsibility to ensure that contractors are fully cognizant of their obligations under the Act and this Part, to provide the Director with any information which comes to its attention that the contractor is not in compliance with the Act or this Part, and to take such actions for noncompliance as set forth in 60-741.31 as may be ordered by the Director.

60-741.25 Evaluations by the Director.

The Director shall be primarily responsible for undertaking such investigations of complaints and other matters as well as evaluations of contractor and agency performance as may be necessary to assure that the purposes of section 503 of the Rehabilitation Act of 1973 are being effectively carried out.

60-741.26 Complaint Procedures.

(e) *Investigations.* The department of Labor or the designated agency shall institute a prompt investigation of each complaint, and shall be responsible for developing a complete case record. A complete case record consists of the following: (1) Name and address of each person interviewed, (2) a summary of his or her statement, (3) copies of summaries of pertinent documents, (4) a narrative summary of the evidence disclosed in the investigation as it related to each charge, and (5) recommended findings and resolutions.

(f) *Responsibilities of agencies.* Agencies shall conduct investigations of complaints in accordance with specific requests of the Director.

(g) *Resolution of matters.* (1) If the complaint investigation shows no violation of the Act or regulations in this Part, or if the agency or the Director decides not to initiate administrative or legal proceedings against the contractor, the complainant shall be so notified. Within 30 days, the complainant may request review by the Director of such a finding or decision.

(2) Where an investigation indicates that the contractor has not complied with the requirements of the Act or this Part, efforts shall be made to secure compliance through conciliation and persuasion within a reasonable time. Before the contractor or subcontractor can be found to be in compliance, it must make a specific commitment, in writ-

ing, to take corrective action to meet the requirements of the Act and this Part. The commitment must indicate the precise action to be taken and dates for completion. The time period allowed should be no longer than the minimum period necessary to effect such changes. Upon approval of such commitment by the Director or the agency, the contractor my be considered in compliance on condition that the commitments are kept. Where the matter has been referred to an agency for investigation and resolution, the contractor and the complainant shall be advised that the resolution is subject to review by the Director and may be disapproved if it is determined that such resolution is not sufficient to achieve compliance.

(3) Where the complaint investigation indicates a violation of the Act or regulations in this Part, (and the complaint has not been resolved by informal means) The Director, or the agency with the approval of the Director, shall afford the contractor an opportunity for a hearing in accordance with 60-741.29.

60-741.27 Noncompliance with the afirmative action clause.

Noncompliance with the prime contractor's or subcontractor's obligations under the affirmative action clause is a ground for taking appropriate action for noncompliance as set forth in 60-741.29 by the agency, the Director, prime contractor, or subcontractor. Any such noncompliance shall be reported in writing to the Director by the agency as soon as practicable after it is identified.

60-741.28 Actions for noncompliance.

(a) *General.* In every case where any complaint investigation indicates the existence of a violation of the affirmative action clause or these regulations, the matter should be resolved by informal means, including conciliation, and persuasion, whenever possible. This will also include estab-

lishing a corrective action program in accordance with 60-741.26 (g) (2). Where the apparent violation is not resolved by informal means, the Director or the agency shall proceed in accordance with the enforcement procedures contained in the Part.

(b) *Judicial enforcement.* In addition to the administrative remedies set forth herein, the Director may, within the limitations of applicable law, seek appropriate judicial action to enforce the contractual provisions set forth in 60-741.4 including appropriate injunctive relief.

(c) *Withholding progress payments.* With the prior approval of the Director so much of the accrued payment due on the contract or any other contract between the government prime contractor and the federal government may be withheld as necessary to correct any violations of the provisions of the affirmative action clause.

(d) *Termination.* A contract or subcontract may be cancelled or terminated, in whole or in part, for failure to comply with the provisions of the affirmative action clause.

(e) *Debarment.* A prime contractor or subcontractor or a prospective contractor or subcontractor may be debarred from receiving future contracts for failure to comply with the provisions of the affirmative action clause.

60-741.29 Formal hearings.

(a) *Hearing opportunity.* An opportunity for a formal hearing shall be afforded to a prime contractor or a subcontractor or a prospective prime contractor or subcontractor by the agency or Director in any of the following circumstances:

(1) An apparent violation of the affirmative action clause by a contractor or subcontractor, as shown by any investigation, is not resolved by informal means and a hearing is requested; or

(2) The Director, or an agency upon prior notification to the Director, proposes to cancel or terminate the contract or withhold progress payments, or cause the contract to be canceled or terminated or progress payments to be withheld, in whole or in part, on a contract or contracts, or to require cancellation or termination of a contract or subcontract or withholding of progress payments; or

(3) The Director, or an agency with the approval of the Director, proposes to declare a prime contractor or subcontractor ineligible for further contracts or subcontracts under the Act.

(b) *Hearing practice and procedure.* (1) Hearings conducted by the Office of Federal Contract Compliance Programs under this Part shall be governed by the rules of practice and procedure contained in 41 CFR Part 60-30 except that the Director shall perform all the duties and functions assigned to the Secretary by that Part.

(2) The practice and procedure for hearings conducted by agencies shall be consistent with the requirements of this section.

60-741.32 Disputed matters related to the affirmtive action program.

The procedures set forth in the regulations in this Part govern all disputes relative to a contractor's compliance with the affirmative action clause and the requirements of this Part. Any disputes relating to issues other than compliance including contract costs arising out of the contractor's efforts to comply, shall be determined by the disputes clause of the contract.

STATEMENT OF CASE

In this case, Petitioner is claiming employment discrimination by a federal contractor, Roadway Express, Inc., (Roadway) on the basis of his handicap, an amputation of the left leg above knee. On February 18, 1977, Petitioner was terminated from his employment with Roadway, at which time he was employed as the Terminal Manager of Roadway's terminal in Griffin, Georgia. At the time of this termination Petitioner had a total of 20 years in the trucking industry, and a total of seven (7) years with Roadway. Petitioner suffered his amputation as a result of an automobile accident on August 3, 1974, and after recovering from these injuries, returned to work in the same position and worked for almost two (2) years with this handicap. Petitioner felt that this termination was because of his handicap and on April 5, 1977, filed a complaint with the Office of Federal Contracts and Compliance Programs (OFCCP), under Section 503 of the Rehabilitation Act of 1973 (Act). Roadway immediately advised the OFCCP they had no contracts and were not subject to these regulations.

I. CIVIL ACTION AGAINST ROADWAY

After Roadway advised they had no contracts, Petitioner filed a civil action in District Court, alleging discrimination in employment because of his handicap. The district court dismissed this action on October 3, 1977, stating that handicaps do not have a "private right of action." This was appealed to the U. S. Court of Appeals for the Fifth Circuit, and was consolidated with *Rogers v. Frito-Lay, Inc.* The court of appeals affirmed this decision on February 15, 1980, a petition for "writ of certiorari" was filed with the Court on May 14, 1980, this petition was denied on October 6, 1980, *see Rogers v. Frito Lay, Inc.* 611 F.2d 1074 (5th Cir.

1980), *cert. denied,* 449 U.S. 889, 101 S.Ct. 246, 66 L.Ed 2d 115 (1980).

THIS PRESENT CASE IS NOT ASKING FOR A RECONSIDERATION OF THIS ACTION.

II. OFCCP COMPLAINT

The OFCCP established that Roadway did indeed have federal contracts, and an investigation into the allegations of the complaint was handled by an investigator from the OFCCP's own office, as shown by Appendix E.

Following is an account of the handling and closure of this complaint by the OFCCP and also the Regional Solicitor of Labor (RSOL), all events mentioned are documented in the complaint file, and Petitioner has received such documentation by way of a "Freedom of Information" request. The latest documents received by Petitioner were from the Office of the Solicitor under postmark of February 15, 1985.

On March 3, 1978, there was a "conciliation meeting" held at a small maintenance office at Roadway's facility in Atlanta, Georgia. Present at this meeting were the OFCCP, Roadway and its attorney, and the man that replaced Petitioner, the mood of this meeting was "varied ranging from hostile to guarded cooperativeness." Petitioner was not invited to this conciliation meeting, and in fact was not aware that a conciliation meeting had taken place until he received documents postmarked February 15, 1985.

On May 10, 1978, the OFCCP investigator gave a report of his investigation (Appendix E) to the Assistant Regional Administrator, OFCCP, who signed this report as "concuring" with the recommendations.

On May 15, 1978, a formal "Notification of Results of Investigation" (NRI) (Appendix F), was issued by the OFCCP to Roadway and to the Petitioner. This NRI stated that Petitioner was terminated from employment because of his handicapping condition, and that Roadway had vio-

lated its obligations under the affirmative action provisions, of Section 503 of the Act. This NRI was issued "On behalf of the United States Department of Labor" and was signed by the Assistant Regional Administrator.

On June 22, 1978, the complaint file was sent to the RSOL for "Legal Action", (Appendix G).

On June 27, 1978, there was another conciliation meeting, this time Petitioner was invited, along with two vice-presidents of Roadway, Roadway's attorney, the OFCCP and a representative of the RSOL. Roadway was un-willing to conciliate, because of the pending legal appeal in the Fifth Circuit Court of Appeals, on the "Private right of action" question. It was stated orally at this meeting, and followed up in writing to all parties, that Petitioner would as a part of any conciliation being reached, withdraw any pending legal action.

The complaint file indicates that the RSOL was to render an opinion as to whether they could pursue the complaint in attempting a settlement while the case was on appeal. The RSOL was to answer this question and advise Roadway by July 1, 1978 and Roadway was to then have their proposal "go or no-go" within 10 days to two weeks after receipt of the RSOL response.

On August 17, 1978, the RSOL in an inter-departmental memo, asked the Associate Solicitor of Labor, if the RSOL or the OFCCP should pursue conciliation, in view of the pending appeal on the "private right of action." A copy of Petitioner's "appellant brief" was sent to the Associate Solicitor of Labor and statement was made that they had been unable to obtain a copy of Roadway's "appellee brief."

On January 24, 1979, a representative of the RSOL wrote a five (5) page inter-office memo to the RSOL, giving his analysis of "our investigation" (Not the OFCCP's investigation), and recommending that no legal action be taken.

Petitioner was not sent a copy of this memo and there is no indication that the OFCCP was sent a copy.

On March 30, 1979, Petitioner met with two representatives of the RSOL, and all details of the complaint were covered. No mention was made by either of these representatives that no action would be taken to correct the violation.

On August 3, 1979, the same representative of the RSOL wrote a seven (7) page inter-office memo to the RSOL, giving yet further analysis and recommending again that no legal action be taken. Again Petitioner was not sent a copy of this memo and there is no indication that the OFCCP received a copy.

On October 3, 1979, an inter-department memo from the RSOL to the OFCCP (Appendix H), returns the complaint file and advised that the RSOL was closing it. They did, however, suggest further conciliation might be in order.

By this time the OFCCP was so confused, that on October 12, 1979, they sent Petitioner a letter stating that his complaint against "Eastern Airlines" (Petitioner's present employer) had been closed. When Petitioner inquired about this, he was told that is was just a mistake, and in fact the regional OFCCP was still trying to get Roadway to agree to another conciliation meeting.

This attempt at further conciliation is proven by the letter from Roadway's attorney to the OFCCP (Appendix I), this attempt failed, and on November 7, 1979, the regional OFCCP wrote Petitioner and closed the complaint, because of the RSOL refusal to take any action (Appendix J). Petitioner appealed this decision to the National OFCCP.

In May of 1980, Petitioner visited the National OFCCP office and was allowed to personally look at the files they were reviewing on the appeal. The files were incomplete, they contained approximately half of the documents that Petitioner had been allowed to view in Atlanta.

On July 31, 1980, an inter-departmental memo from the National OFCCP to the regional OFCCP questioned why the files were incomplete. Specific questions were asked as to why there was no documentation to statistical reports listed in January 24, 1979 memo from the representative of the RSOL, and why no documentation of the Roadway district manager's account of Petitioner termination. This memo then states, "In order to make an adequate review of this case, we need the entire file."

On July 24, 1981, an inter-departmental memo to the Director, OFCCP (Appendix K), gives a four page analysis of the facts, position, issues and recommendation of the National OFCCP, "to concur with the Regional Office letter of November 7, 1979 informing the (Petitioner) that the case is administratively closed because of the Solicitor's Office decision to take no further action on his complaint." On July 24, 1981 (Appendix L), the Director, OFCCP closed the complaint file with no action.

III. CIVIL ACTION AGAINST THE DEPARTMENT OF LABOR

Petitioner filed the instant complaint in district court alternately under the Administrative Procedure Act, 5 U.S.C. 701, *et seq.*, or *mandamus* relief under 28 U.S.C. 1361 to obtain enforcement by the U.S. Department of Labor, of the findings by the OFCCP, as stated in its formal NRI, that a federal contractor, Roadway, was in violation of its affirmative action obligations by terminating Petitioner from employment because of his handicapping condition although Petitioner continually demonstrated that he could perform his duties.

The district court issued two orders in the proceedings below. The earlier order granted the Secretary of Labor's motion to dismiss Petitioner's request for mandamus relief,

and treated all other motions by the parties as one for summary judgment. The effect of the foregoing was to deny the Secretary's lack of standing argument in support of its motion to dismiss, and grant judicial review of the agency decision not to invoke enforcement of the Act, "under the limited standard of 'abuse of discretion'". Oral argument was heard on November 4, 1982, and an order denying relief to Petitioner was issued on June 6, 1983. The district court concluded that the Secretary did not abuse his discretion in refusing to initiate enforcement proceedings, and granted defendant's motion for summary judgment.

On November 26, 1984, the Circuit Court of Appeals decision was handed down and held that (1) Court of Appeals had jurisdiction to evaluate procedure by which the OFCCP referred employee's case file to the RSOL and to review findings and conclusions of the Solicitor; (2) Director of the OFCCP did not impermissibly abdicate his authority to enforce the Act by acquiescing in opinion to the Solicitor's Office, after having already made an initial finding of discrimination; and (3) findings of Office of the Solicitor, upon which Secretary of Labor based his decision not to challenge employer's termination of handicapped employee as a violation of the Act, were neither arbitrary, capricious or otherwise contrary to law. In so doing the court of appeals affirmed the district court's decision.

REASONS FOR GRANTING THE PETITION

This case presents important and recurring questions concerning the enforcement of the affirmative action obligations placed on federal contractors by the mandatory language in Section 503 of the Act, and the seemingly mandatory language of the implementing regulations Part 60-741, and the ability of not only the OFCCP to enforce these regulations, but also the ability of our federal courts to remove the discriminatory barriers of handicapped based employment practices at least from federal contractors. Absent the grant of this petition, will result the continuing piecemeal enforcement of only federal contractors who are willing to settle violations through informal conciliation and surely threatens effective administration of the Rehabilitation Act.

> "The handicapped face two distinct barriers to full participation in our society - one physical or mental and the other attitudinal. For those individuals who have overcome the physical or mental barrier and established their qualifications, Congress has established protections, under the terms of 503, from the invidious discrimination that results from the attitudinal barrier."

The foregoing statement was made in a dissenting opinion by Circuit Judge Goldberg in *Rogers v. Frito-Lay*, 611 F.2d 1085 (5th Cir.) as he felt that a "private right of action" would aid in acheiving the results Congress had in mind when it passed the Act. The Court was silent, *see Rogers v. Frito-Lay*, 611 F.2d 1085 (5th Cir.) *cert. denied*, 449 U.S. 889, 101 S.Ct. 246, 66 L.Ed. 2d 115 (1980).

1. In his *Proclamation of February 6, 1981*, President Reagan puts the number of handicaps at 35 million. As stated in *Appendix C of "Accommodating the Spectrum of Individual Abilities"*, published by the *U.S. Commission on Civil Rights, (Sept. 1983)*, there are approximately 11 mil-

lion to 15 million handicaps in the working age group. A report entitled, *"Toward the Goal of Greater Opportunity for Employment"* by the *U. S. Council for the International Year of Disabled Persons (1981),* states that approximately half of all working-age disabled people are out of the labor force or unemployed. The *U. S. Commission on Civil Rights,* continues in its *"Accommodating the Spectrum of Individual Abilities",* by stating that statistical studies have shown that unemployment rates among handicapped people are drastically higher than rates of unemployment for nonhandicapped people, only a small percentage of the handicapped Americans who could work if given the opportunity are actually employed. Unemployment rates among handicapped workers are currently estimated to be between 50 to 75 percent. Further proof that this is indeed a national issue of great importance is stated in *The Annual Report for Fiscal Year 1980,* published by the *U. S. Department of Education, Rehbilitation Service Administration (Oct. 1982),* it is estimated that life-time earnings for persons rehabilitated in Fiscal Year 1979 will improve by $11 for every dollar spent on services for all clients whose cases were closed in that year, also in the first year after closure persons rehabilitated in Fiscal Year 1979 were expected to pay an estimated $88.8 million more in Social Security payroll taxes, 99.3 million in Federal income tax payments, 14.2 million in state and local income taxes and 28.5 million in state and local sales tax receipts, further, a decrease in dependency on public assistance of 39.8 million was expected in the first year after rehabilitation. These tax returns and savings equal approximately 270.6 million for the first year. These figures point out the validity of President Reagan's words in his *Proclamation of February 6, 1981,* "All of us stand to gain when those who are disabled share in America's opportunities." Two recent cases, the present case and *Presinzano v. Hoffman-LaRoche, Inc.,*

726 F.2d 105, (3rd Cir. 1984) indicate that the questions presented are of utmost national importance to handicapped individuals. This case presents practical questions concerning enforcement of section 503 and its implementing regulations as shown in Part 60-741.

2. The district court, on September 30, 1982, in refusing *mandamus* states that the Secretary exercised his initial nondiscretionary duty by investigation the claim and refers to 60-741.28, **but,** they quote **ONLY** the first sentence and completely ignore the same nondiscretionary duty as stated in the next two sentences:

> "This will also include establishing a corrective action program in accordance with 60-741.26 (g)(2). Where the apparent violation is not resolved by informal means, the Director or the agency shall proceed in accordance with the enforcement procedures contained in this Part."

Thus the district court, by not applying all three sentences of 60-741.28, was in error in its decision that *mandamus* would not lie in this situation.

3. The district court on June 6, 1983 in dismissing this action, was confused, under "Conclusions of Law", par 2, it stated:

> "If the agency cannot secure compliance through informal resolution, the OFCCP is required to proceed with enforcement procedures provided by these regulations. 41 C.F.R. 60-741.28 (a)." (see note 2)

However, note 2 of the district court's order states:

> "2/ Whenever an investigation indicates noncompliance, the contractor becomes entitled to a hearing in accordance with 41 C.F.R. 60-741. 29 *See* 41 C.F.R. 60-741.26 (g)(3). Section 60-741.29 (b)(1) of Title 41, C.F.R., provides that all hearings conducted under regulations implementing the Act shall be governed by the rules set forth in 41 C.F.R., Part 60-30. Under that Part,

> (t)he Solicitor of Labor, Associate Solicitor for Labor Relations and Civil Rights Regional Solicitors and Regional Attorney upon referral from the Office of Federal Contract Compliance Programs, are authorized to institute enforcement proceedings by filing a complaint . . .
>
> "41 C.F.R. 60-30.5 (a)."

The district court is erroneously putting the RSOL in the role as prosecutor by this reference, *because there has never been a hearing.* If the OFCCP had followed the regulations in 60-741.29, there are three sets of circumstances that warrant a formal hearing, (1) the violation is not resolved and a hearing is requested; (2) the OFCCP proposes to cancel or terminate contractors or withhold progress payments, or; (3) the OFCCP proposes to declare a contractor ineligible for further contracts. In this complaint, the OFCCP simply closed the matter because of the RSOL's refusal to take action, no hearing was held. Roadway certainly would not ask for a hearing, *and a hearing on the facts of the complaint has thus far been denied to Petitioner.*

The district court stops short in reciting 41 C.F.R. 60-30.5(a), a complete reading shows that the RSOL is authorized to *institute* enforcement proceedings by filing a complaint *"and serving the complaint upon the contractor which shall be designated as the defendant, the Department of Labor, OFCCP, as shall be designated on plaintiff."* The district court also fails to mention that under this formal hearing, 60-30.15 states that an Administrative Law Judge has the authority and responsibility for these proceedings - NOT THE RSOL. The handicapped individual is allowed participation under 60-30.16 (a). Not only is the RSOL *not responsible for the enforcement,* 60-30.20

states that no employee or agent of the Federal Government engaged in the investigation and prosecution are allowed to participate or advise, except as witness or counsel in the proceedings. The fact remains that the complaint was never allowed to reach this stage, therefore these regulations, in Part 60-30, **DO NOT APPLY**. Petitioner agrees that the district court made a correct statement that the OFCCP is required to proceed with enforcement procedures, but the district court has made an incorrect reference to the hearing procedures. The OFCCP has failed to follow its own regulations by allowing the RSOL to short-circuit this procedure of enforcement and also the provisions for a formal hearing, and the district court has failed to see this.

4. The court of appeals in its decision, also completely ignores the nondiscretionary duty of the OFCCP to proceed with enforcement if informal conciliation fails. At note 4. of this decision, they also quote 60-741.28 (a), but ONLY the first sentence, they fail as did the district court, to complete the last two sentences requiring a corrective action program and if informal conciliation fails to proceed with enforcement.

The court of appeals places entirely too much emphasis on the RSOL's investigation and the fact that the RSOL reviewed the file twice. Note 5, of their decision admits that the RSOL was a "compliance agency" in this case, and as such conducts investigations of complaints in accordance with "specific request" of the OFCCP. The court of appeals is overlooking the fact that no such "specific request" for another investigation was made. The court of appeals is accepting at face value the argument made by the Secretary that *the formal "NRI" issued "On behalf of the U.S. Department of Labor"*, was only an initial investigation. There are no documents in the complaint file, that indicate the OFCCP made a "specific request" for an RSOL investiga-

tion, nor are there any documents of a NRI or an "amended" NRI being issued, showing results of such an investigation. The reference, in the court of appeals decision at III. (5), states the Solicitor's Office *reviewed* the file twice. The only mention of this in the complaint file is the inter-departmental memos from the representative of the RSOL of January 24, 1979 and August 3, 1979, to the RSOL. And as pointed out in Petitioner's "Brief for Appellant", there are many many errors of fact in these memos. It is unbelievable, that a representative of the RSOL would make statements in regards to statistics and percentage increases and/or decreases that completely contradict the "Contractor Submissions", that are a part of the complaint file. All these errors or contradictions are spelled out in Petitioner's "Brief for Appellant" to the court of appeals, and yet the only mention by the court of appeals is that the RSOL reviewed the file twice.

5. The court of appeals is also in error at I., when it refuses to address the circumstances in which a federal contractor is found in violation of section 503 but decides not to enforce, and states:

> "In that situation, a plaintiff such as Moon would challenge the nonenforcement decision itself, not the determination of violation. In this case, the Secretary found no violation. Thus, there was no basis upon which to instigate enforcement under section 503."

Petitioner was and is, in fact, challenging the nonenforcement of the violation as proven by the OFCCP's investigation and issuance of NRI. If a qualified handicap files a complaint under section 503, and a contractor is found in violation, and conciliation fails, and the RSOL refuses to take enforcement action, and the OFCCP closes the file THREE (3) YEARS after having found a violation, and the Court uses only the last letter of closure for consideration,

the complete set of regulations enacted to enforce section 503 are rendered useless. Petitioner agrees that many handicapped individuals are aided greatly by these regulations, IF the contractors are willing to conciliate in good faith. BUT, if a contractor is not willing to conciliate and the RSOL refuses enforcement, and the OFCCP is allowed to abdicate its authority to enforce, all a contractor has to do is refuse conciliation and wait out the handicap who filed the complaint. The contractor knows full well, that a "private right of action" is not allowed, and also knows full well, that no action will be taken by the OFCCP. Surely this is not what Congress had in mind when it passed the Act.

6. The OFCCP has made a legal error, and has abused its authority, by not adhering to its own regulations. The regulations are constructed with duty-creating phrases that are conclusive, and as the Court has noted:

> "This principle of statutory construction reflects an ancient maxim - *expressio unius est exclusio alterius.*" "(W)hen legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies," *National Railroad Pasenger Corp. v. National Association of Railroad Passengers,* 1974, 414 U.S. 453, 458, 94 S.Ct. 690, 693, 38 L.Ed. 2d 646, 642.

Congress strongly believed that the legislation to enact the Act was necessary "to deal with the problems of discrimination in Federal employment and Federal grants and contracts." *Ad. News* 2079. Consequently, the final legislation boldly declared as one of its broad purposes, "to promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment . . . " 29 U.S.C. 701 (8) (1975), "The Vocational Rehabilitation Act, by its very definition, is an act aimed at encouraging employment by help-

ing disabled individuals to engage in remunertive occupations.", *Scott v. Parham*, 69 F.R.D. 324, 329 (1975). The rights it gives handicapped individuals is akin to any other Federal Act and the Court ruled in *Caulfield v. Dept. of Agriculture*, 293 F.2d 217, 222 (5th Cir. 1961), *cert. denied*, 369 U.S. 858, 82 S.Ct. 946, 8 L.Ed. 2d 16, ". . . comes into being from the Federal Act and the effectual enforcement of that right depends on the validity, construction or effect of that statute."

7. The courts of appeal do agree that these regulations are constructed so as to effect enforcement. *See Rogers v. Frito-Lay*, 611 F.2d 1074, 1077 fn. 2 (5th Cir. 1980), "The words of the statute, (which) are remarkably plain and jargon-free . . .", "The duty it directly creates is imposed upon federal departments and agencies . . .", "The statute expressly discusses *administrative enforcement* . . ."(emphasis added). Another court of appeals stated: "In addition to seeking judicial action, *the Director may impose administrative sanctions* on the contractor, including withholding progress payments, termination of the contract, and debarment of the contractor from receiving further federal contracts." *see Howard v. Uniroyal*, 719 F.2d 1552 (11th Cir. 1983) (emphasis added). Both of the foregoing opinions point out that the Director is authorized to initiate administrative enforcement, regardless of the RSOL initiating judicial action. Therefore, the OFCCP breached its duty to enforce the violation by closing the complaint with no action, because of the RSOL's refusal to initiate judicial enforcement.

8. The RSOL, not only failed to carry out the request of the Director to take legal action (Appendix H), a representative of the RSOL gave his personal view point to the contractor (Appendix I) and biased and prejudiced the contractor against the need for any further conciliation. In view of the

fact that the NRI, showing the contractor in violation of its affirmative action obligations, and there having been no amendment to this NRI, petitioner finds these personal views very un-ethical. These facts alone are reason for the Court to grant this petition and examine all the details.

9. The instant case is not an isolated instance of the OFCCP abdicating to the RSOL as the only means of enforcing section 503, *see Prisinzano v. Hoffman-LaRoche*, 726 F.2d 105, 111 (3rd Cir. 1984):

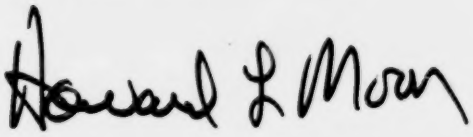
> "We conclude that without RSOL concurrence we do not have a prosecutor. Therefore we recommend administrative closure of this complaint."

10. In view of the numerous circuit denials of a private remedy, *see Davis v. United Airlines*, 662 F.2d 120 (2nd Cir. 1981): *Fisher v. Tucson*, 663 F.2d 861 (9th Cir. 1981): *Hoopes v. Equifax, Inc.*, 661 F.2d 134 (6th Cir. 1979): *Simpson v. Reynolds Metal Co.*, 629 F.2d 1226 (7th Cir. 1980), **and the Court's silence,** *see Rogers v. Frito-Lay*, 611 F.2d 1074 (5th Cir.), *cert. denied*, 449 U.S. 889, 101 S.Ct. 246, 66 L.Ed. 2d 115 (1980) and *Simson v. St. Louis County*, 656 F.2d 316 (8th Cir. 1981), *cert. denied*, - U.S. ____, 102 S.Ct. 1485, 71 L.Ed. 688 (1982), the only hope qualified handicapped individuals have for any type recourse in employment discrimination is through the Rehabilitation Act and section 503. Thus, the OFCCP is the exclusive agency for enforcement of these regulations, when the OFCCP waives its authority to the RSOL, or fails to seek enforcement of any of the options open to it, the handicapped individual is being denied procedural "due process of law" as guaranteed by the Fifth Amendment of the U. S. Constitution.

Conclusion

The petition for writ of certiorari should be granted.

Respectfully submitted,



Howard L.Moon
Petitioner

CERTIFICATE OF SERVICE

I, Howard L. Moon, hereby certify that on this 20th day of March, 1985, I served three copies of the foregoing Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit upon the following counsel for Respondent:

Mr. Rex Lee
Solicitor General
Department of Justice
Room 5614
Washington, D. C. 20530

by depositing same in the United States Mail in a properly addressed envelope with sufficient postage affixed thereon to insure delvery.

Howard L Moon

Howard L. Moon
Petitioner

Howard L. Moon
1407 Cabin Creek Trail
Griffin, Georgia 30223
(404) 228-8050

Dated: March 20, 1985

Brenda J. Burford
Notary Public

My term expires May 22, 1987

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

NO. 83-8530

HOWARD L. MOON — Plaintiff-Appellant

vs.

SECRETARY, UNITED STATES DEPARTMENT OF LABOR — Defendant-Appellee

Nov. 26, 1984

Handicapped former employee brought action seeking judicial relief on basis that his termination was a violation of the Rehabilitation Act. The United States District Court for the Northern District of Georgia, *Horace T. Ward, J.*, granted summary judgment in favor of the Secretary of Labor, and former employee appealed. The Court of Appeals, *Lewis R. Morgan, Senior Circuit Judge*, held that: (1) Court of appeals had jurisdiction to evaluate procedure by which Office of Federal Contract Compliance Programs referred employee's case file to Office of the Solicitor and to review findings and conclusions of the Solicitor; (2) Director of the OFCCP did not impermissibly abdicate his authority to enforce the Rehabilitation Act by acquiescing in opinion of Solicitor's Office, after having already made an initial finding of discrimination; and (3) findings of Office of the Solicitor, upon which Secretary of Labor based his decision not to challenge employer's termination of handicapped employee as a violation of the Rehabilitation Act, were neither arbitrary, capricious or otherwise contrary to law.

Affirmed.

Appendix A — Opinion of the Court of Appeals

1. Civil Rights 12.4

Court of Appeals had jurisdiction to evaluate procedure by which the Office of Federal Contract Compliance Programs referred to Office of the Solicitor case file of former employee alleging that his termination was attributable to his handicap, and to review findings and conclusions of the Solicitor. 5 U.S.C.A. 551(13), 704, 706.

2. Civil Rights 12.4

Nothing in applicable regulations precluded Director of the Office of Federal Contract Compliance Programs from seeking counsel from the Office of the Solicitor before deciding whether to bring administrative action on handicap discrimination claim, notwithstanding that initial complaint investigation had showed that contractor was in violation of Rehabilitation Act. Rehabilitation Act of 1973, 503, 29 U.S.C.A. 793.

3. Civil Rights 12.4

Where Director of the Office of Federal Contract Compliance Programs, with advice of the Office of the Solicitor, concluded that there was no apparent violation of affirmative action clause in termination of handicapped employee, OFCCP was not obligated to afford employee an opportunity for a hearing as a precedent to further possible administrative action. Rehabilitation Act of 1973, 503, 29 U.S.C.A. 793.

4. Civil Rights 12.4

Director of the Office of Federal Contract Compliance Programs did not impermissibly abdicate his authority to enforce the Rehabilitation Act by acquiescing in opinion of Office of the Solicitor that handicapped employee's termi-

nation was not a violation of the Act, after having already made an initial finding of discrimination. Rehabilitation Act of 1973, 503, 29 U.S.C.A. 793.

5. Civil Rights 12.4

Findings of Office of the Solicitor, upon which Secretary of Labor based his decision not to challenge employer's termination of handicapped employee as a violation of the Rehabilitation Act, were neither arbitrary, capricious or otherwise contrary to law. Rehabilitation Act of 1973, 503, 29 U.S.C.A. 793.

Appeal from the United States District Court for the Northern District of Georgia.

Before RONEY and ANDERSON, *Circuit Judges* and MORGAN,
Senior Circuit Judge.

LEWIS R. MORGAN, *Senior Circuit Judge*:

Roadway Express, Inc. terminated the employment of the plaintiff, an amputee. The plaintiff filed a complaint with the United States Department of Labor pursuant to section 503(b) of the Rehabiiitation Act of 1973, 29 U.S.C.A. 793(b) (West 1975),[1] attributing his termination to his

1. Section 503 provides in pertinent part as follows:

Employment under Federal contracts

(a)Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 706(7) of this title. The provisions of this section shall apply to any subcontract in excess of $2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States. The President shall implement the provi-

(Footnote continued on following page.)

Appendix A — Opinion of the Court of Appeals

(Footnote continued from preceding page.)

sions of this section by promulgating regulations within ninety days after September 26, 1973.

(b) If any handicapped individual believes any contractor has failed or refuses to comply with the provisions of his contract with the United States, relating to employment of handicapped individuals, such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.

29 U.S.C.A. 793 (West 1975 & Supp. 1976-1983) Pursuant to the provision, the implementing regulations require all federal contracts to contain expressly or by reference the following clause:

AFFIRMATIVE ACTION FOR HANDICAPPED WORKERS

(a) The contractor will not discriminate against any employee or applicant for employment because of physical or mental handcap in regard to any position for which the employee or applicant for employment is qualified. The contractor agrees to take affirmative action to employ, advance in employment and otherwise treat qualified handicapped individuals without discrimination based upon their physical or mental handicap in all employment practices such as the following: employment, upgrading, demotion or transfer, recruitment, advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.

(b) The contractor agrees to comply with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the Act.

(c) In the event of the contractor's noncompliance with the requirements of this clause, actions for noncompliance may be taken in accordance with the rules, regulations and relevant orders of the Secretary of Labor issued pursuant to the Act.

(d) The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices in a form to be prescribed by the Director [of the OFCCP], provided by or through the contracting officer. Such notices shall state the contractor's obligation under the law to take affirmative action to employ and advance in employment qualified handicapped employees and applicants for employment, and the rights of applicants and employees.

(e) The contractor will notify each labor union or representative of workers with which it has a collective bargaining agreement or other contract understanding, that the contractor is bound by the terms of section 503 of the Rehabilitation Act of 1973, and is committed to take affirmative action to employ and advance in employment physically and mentally handicapped individuals.

(f) The contractor will include the provision of this clause in every subcontract or purchase order of $2,500 or more unless exempted by rules, regulations,

(Footnote continued on following page.)

handicap. The office of Federal Contract Compliance Programs (OFFCP)[2] investigated the complaint[3] and concluded that Roadway had indeed violated its obligations under section 503. The OFCCP invited Roadway to settle the matter informally[4] and referred the case to the Office of the Solicitor.[5] The Solicitor investigated further and deter-

(Footnote continued from preceding page.)

> or orders of the Secretary issued pursuant to section 503 of the Act, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the Director of the Office of Federal Contract Compliance Programs may direct to enforce such provisions, including action for noncompliance.

41 C.F.R. 60-741.4 (1977); *see Howard v. Uniroyal, Inc.*, 719 F.2d 1552, 1562 (11th Cir. 1983) (no state-law third party beneficiary action based upon this contract clause).

2. Section 503 of the Rehabilitation Act requires the President to issue regulations to implement the federal contractor affirmative action statutes. 29 U.S.C.A. 793(a) (West Supp. 1976-1983). The President delegated this authority to the Secretary of Labor. Executive Order 11758, 39 Fed.Reg. 2075 (1974). The Secretary in turn delegated the authority to the Assistant Secretary for Employment Standards, Secretary of Labor Order No. 16-75, 4(a)(16), 40 Fed.Reg. 55913 (1975), and then to the Deputy Under-Secretary for Employment Standards, Secretary of Labor Order No. 1—81, 46 Fed.Reg. 28048 (1981). The regulations specify that a complaint may be filed with the Director of the OFCCP and that the Director is primarily responsible for investigating the complaints. 41 C.F.R. 60-741.25, 741.26(a) (1977).

3. "The Department of Labor or the designated agency shall institute a prompt investigation of each complaint, and shall be responsible for developing a complete case record." 41 C.F.R. 60-741.26(e) (1977).

4. "In every case where any complaint investigation indicates the existence of a violation of the affirmative action clause or these regulations, the matter should be resolved by informal means, including conciliation, and persuasion, whenever possible." 41 C.F.R. 60-741.28 (a) (1977).

5. "Agencies shall conduct investigations of complaints in accordance with specific requests of the Director." 41 C.F.R. 60-741.26(f) (1977). "Agency" includes a "complaince agency of the government." *Id.* 60-741.2. A "complaince agency" is "any agency which the Director requests to conduct investigations and such other responsibilities in connection with the administration of the Act as the

(Footnote continued from preceding page.)

mined that Moon's termination was a valid exercise of Roadway's management discretion. The OFCCP deferred to the Solicitor and closed the case. Moon exhausted his administrative remedies and sought judicial relief.[6]

The district court held on cross-motions for judgment on the pleadings that the decision of the Secretary of Labor[7] declining to initiate enforcement proceedings was not an unreviewable exercise of discretion but was subject to the arbitrary and capricious or abuse of discretion standard of review specified in the Administrative Procedure Act, 5 U.S.C.A. 706 (West 1977). Treating the Rule 12(c) motions as motions for summary judgment for purposes of the remaining issues, the court subsequently held that the applicable law and regulations endowed the Solicitor with the discretion to commence *vel non* enforcement under section 503 and that the Secretary's final decision was not arbitrary and capricious. The court therefore granted the Secretary's motion and denied Moon's. We affirm, though on different reasoning.

Moon insists that the findings of the initial OFCCP investigation committed the Department of Labor to

(Footnote continued from preceding page.)

Director may request, as appropriate." *Id.* Thus, the Office of the Solicitor was a "complaince agency" in this case. The Solicitor of Labor also has exclusive authority to bring legal proceedings under the Rehabilitation Act and to determine whether such proceedings or representation is appropriate in a given case. Secretary of Labor Order No. 16—75, 4(d), 40 Fed. Reg. 55913 (1975).

6. This is Moon's second appearance before this court. *See Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1085 (5th Cir.) (no private right of action against federal contractor under section 503), *cert. denied*, 449 U.S. 889, 101 S.Ct. 246, 66 L.Ed.2d 115 (1980).

7. Throughout this opinion, the "decision of the Secretary" refers to the final decision of the OFCCP by which it closed Moon's file in reliance upon the recommendation of the Solicitor. This decision was the "agency action" that entitled Moon to judicial review. *See* 5 U.S.C.A. 702 (West 1977).

pursue its enforcement procedures against Roadway. The decision of the OFCCP to close the case in reliance upon the opinion of the Solicitor, he continues, was a "clean abdication of executive authority" because the pertinent regulations endow the OFCCP alone with the discretion to initiate administrative proceedings under section 503. Appellant's Brief at 15. He concludes that even if the Secretary reached his final decision by the proper procedures, that decision was nevertheless based upon a misapprehension of the relevant facts and misapplication of the pertinent law.

I. JUDICIAL REVIEWABILITY

Our task in resolving this case is simplified by discerning percisely what Moon challenges. Three agency actions or rulings are involved: the decision of the Secretary to forego enforcement action against Roadway, the Opinion of the Solicitor's Office upon which that decision was based and the inter-departmental procedure by which the investigation and resolution of Moon's claim was processed. We need not address the circumstances in which the Secretary determines that a federal contractor has violated section 503 but nevertheless decides not to institute enforcement proceedings. In that situation, a plaintiff such as Moon would challenge the nonenforcement decision itself, not the determination of violation. In this case, the Secretary found no violation. Thus, there was no basis upon which to instigate enforcement under section 503. Moon must therefore successfully attack the determination of the Solicitor to prevail. He may also challenge the referral of his case by the OFCCP to the Solicitor. "[A]gency deviation from its own regulations and procedures may justify judicial relief in a case otherwise properly before the court." *Jean v. Nelson,*

727 F.2d 957, 976 (11th Cir. 1984) (en banc) (*quoting Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1041 n. 28 (5th Cir. Unit B 1982); *see C. A. White Trucking Co. v. United States*, 555 F.2d 1260, 1264 (5th Cir. 1977) ("[W]e shall set aside agency action, findings or conclusions... made without observance of procedure required by law....").

[1] Thus, the threshold question is whether we have jurisdiction to evaluate the procedure by which OFCCP referred Moon's case file to the Solicitor and to review the findings and conclusions of the Solicitor. We hold that we do. Each is a "preliminary, procedural, or intermediate agency action or ruling"[8] that is reviewable with the final agency action, the nonenforcement decision. 5 U.S.C.A. 704 (West 1977). As agency actions made reviewable by statute, *id.*, they are subject to judicial review unless "statutes preclude judicial review" or "agency action is committed to agency discretion by law." *Id.* 701. No statutes preclude judicial review. Neither action is "committed to agency discretion by law," for section 503 and its implementing regulations are not "drawn in such broad terms

8. "Agency action" is defined to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C.A. 551(13) (West 1977). An "order" is "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rulemaking but including licensing." *Id.* 551(6). These definitions, when read in conjunction with 5 U.S.C.A. 704, are sufficiently inclusive to include the recommendation of the Solicitor and the means by which the case was referred to him. The procedural question would probably be subject to review totally apart from the terms of the Administrative Procedure Act. *See Local 2855, American Federal of Government Employees (AFGE) v. United States*, 602 F.2d 574, 580 & n. 15 (3rd Cir. 1979); *Curran v. Laird*, 420 F.2d 122, 131 (D.C.Cir. 1969). We may also in any event review the Solicitor's statement of reasons to insure that the Department of Labor did not omit consideration of any relevant facts or rely upon improper consideration. *See Save the Bay, Inc. v. Administrator of the EPA*, 556 F.2d 1282, 1295-96 (5th Cir. 1977).

that in a given case there is no law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401, U.S. 402, 410, 91 S.Ct. 814, 821, 28 L.Ed. 2d 136 (1971) *(quoting* S.Rep. No. 752, 79th Cong., 1st Sess. 26 (1945)).[9] Thus, as to these matters, we may "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, ...otherwise not in accordance with law [, or] without observance of procedure required by law." 5 U.S.C.A. 706.

II. THE REFERRAL BY THE OFCCP TO THE SOLICITOR

[2] Under the regulations effective at the time that Moon filed his claim with the Department of Labor, an employee could file a complaint with the Department alleging that a federal contractor had violated section 503. The Department was then to institute a "prompt investigation." 41 C.F.R. 60-741.26(e) (1977). The regulations then provided as follows:

> (1) If the complaint investigation shows no violation of the Act or regulations in this part, *or if the agency or the Director decides not to initiate administrative or legal procedings against the contractor,* the complainant shall be so notified. Within 30 days, the complainant may request review by the Director of such a finding or decision.

9. In this case, the propriety of the referral of Moon's case file to the Solicitor may be determined by analysis of the pertinent regulations implementing section 503. The findings and the conclusions of the Solicitor, upon which the Secretary based his final decision not to begin enforcement against Roadway, were based solely upon insufficient evidence to determine that Roadway had discriminated against Moon because of his handicap. Review of such a decision is uniquely within the expertise of this court.

(2) Where an investigation indicates that the contractor has not complied with the requirements of the Act or this part, efforts shall be made to secure compliance through consiliation and persuasion within a reasonable time... *Id.* 741.26 (g) (emphasis added). If conciliation failed, the OFCCP was to "proceed in accordance with the enforcement procedures contained" in the regulations. *Id.* 741.28(a). Thus, the regulations contemplated that the Director of the OFCCP may decline to initiate administrative enforcement proceedings against a federal contractor even if the initial complaint investigation showed that the contractor had violated section 503. *See id.* 741.26(g)(1). Nothing in the regulations precluded the Director from seeking the counsel of the Solicitor before deciding whether to bring administrative action. Indeed, "an administrative agency has inherent discretion to solicit the view of its legal staff, and to consider even the unsolicited views of its legal staff, particularly when it is precisely these attorneys who have responsibility for the enforcement procedings." *Presinzano v. Hoffman-La Roche, Inc.*, 726 F.2d 105, 111 (3d Cir. 1984). The regulations expressly authorized the Director of the OFCCP to delegate investigation responsibilities to other agencies. 41 C.F.R. 60-741.26(f) (1977).

[3] Following the initial conclusion of the OFCCP that Roadway had violated section 503, Roadway, Moon, their attorneys, and representatives of the OFCCP held a conciliation meeting pursuant to the regulations. *See id.* 741.26(g)(2). This meeting was fruitless largely because of Moon's pending legal actions against Roadway. Moon contends that the regulations required the OFCCP to

afford Roadway an opportunity for a hearing at this point as a precedent to further possible administrative action. *See id.* 60-741.26(g)(3). In the circumstances of this case, however, the Director of the OFCCP was required to give Roadway a formal hearing only if an "apparent violation of the affirmative action clause by [Roadway], as shown by any investigation, [was] not resolved by informal means and a hearing [was] requested." *Id.* 60-741.29 (a)(1). The Director, with the advice of the Solicitor, concluded that there was "no apparent violation of the affirmative action clause." Therefore, no hearing was required. "Nothing in the Administrative Procedure Act prohibits an agency from changing its mind, if that change aids it in its appointed task." *American Petroleum Institute v EPA*, 661 F. 2d 340, 355 (5th Cir. Unit A 1981).

[4] Lastly, Moon argues that the Director of the OFCCP impermissibly abdicated his authority to enforce the Rehabilitation Act by acquiescing to the opinion of the Solicitor's Office after having already made an initial finding of discrimination. This argument follows from a misunderstanding of the regulatory scheme. The responsibilities of the OFCCP and the Solicitor are complementary—both are surrogates of the Secretary, responsible as delegatees for certain aspects of enforcement of section 503. *See supra* notes 2 & 5. The OFCCP does not abdicate its responsibility by requesting input from within this symbiosis. Further, following the recommendation of the Solicitor's Office, the National Office of the OFCCP reviewed Moon's case file to insure that the Solicitor had considered all the relevant facts. This addi-

tional review also included information submitted by Moon subsequent to the Solicitor's opinion. The OFCCP then informed Moon of its agreement with the conclusion of the Solicitor. This chronology convinces us that the OFCCP did not abdicate any of its responsibility under the Rehabilitation Act and the implementing regulations. The OFCCP has "discretion either to seek or take the advice of its attorneys in determining the merits of a case, or to decline to proceed with a case after it [has] been determined to be unsuitable for further legal action." *Presinzano,* 726 F.2d at 112.

III. REVIEW OF THE SOLICITOR'S ANALYSIS AND RECOMMENDATIONS

In reviewing the statement of reasons for nonenforcement of Moon's claim, we may consider only "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.... Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park,* 401 U.S. at 416, 91 S.Ct. at 824 (citation omitted). The agency must articulate a "rational connection between the facts found and the choice made." *Bowman Transportation, Inc. v. Arkansas-Best Freight Systems, Inc.,* 419 U.S. 281, 285, 95 S.Ct. 438, 442, 42 L.Ed.2d 447 (1974) (*quoting Burlington Truck Lines v. United States,* 371 U.S. 156, 168, 83 S.Ct. 239, 245, 9 L.Ed.2d 207 (1962)). "While we may not supply a reasoned basis for the agency's action that the agency itself has not given, ... we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned."

Bowman Transportation, 419 U.S. at 285-86, 95 S.Ct. at 441-42 (citation omitted). "In summary, we must accord the agency considerable, but not too much deference; it is entitled to exercise its discretion but only so far and no further; and its decision need not be ideal or even, perhaps, correct so long as not 'arbitrary' or 'capricious' and so long as the agency gave at least minimal consideration to the relevant facts as contained in the record." *American Petroleum Institute v. EPA,* 661 F.2d 340, 349 (5th Cir. Unit A 1981).[10]

[5] After careful consideration of the record, we are unable to find any basis upon which to disapprove the findings and conclusions of the Secretary as stated in the recommendations of the Solicitor. The Solicitor's Office reviewed Moon's file twice, once after Moon was allowed to supplement it with additional information. The National Office of the OFCCP then reviewed the file again at the insistence of Moon and his attorney but agreed with the conclusions of the Solicitor. Moon attacks on appeal certain specific findings of the Solicitor's recommendations. None of his contentions, however, are relevant to the Secretary's ultimate finding that Roadway terminated Moon for reasons other than his handicap. *See* Record at 69 ("[T]he evidence does tend to indicate that the company acted unwisely in terminating

10. On appeal of the grant of a motion for summary judgment, this court applies the same legal standards as those that control the district court in determining whether summary judgment is appropriate. *Thrasher v. State Farm Fire and Casualty Co.,* 734 F.2d 637, 638 (11th Cir. 1984) (*citing Environmental Defense Fund v. Marsh,* 651 F.2d 983, 991 (5th Cir. 1981)). Moon argues, however, that the district court's failure to issue findings of fact and conclusions of law renders that court's decision incapable of review. Such findings and conclusions are unnecessary upon the disposition of a summary judgment motion. FED.R.CIV.P. 52.

a long-term employee because of his effort to communicate to his superiors that a newly initiated sales program was unworkable, and the subsequent termination of such superiors tends to indicate that Mr. Moon was right."). We therefore hold as a matter of law that the findings of the Solicitor, upon which the Secretary based his decision not to challenge Roadway's termination of Moon, were neither arbitrary, capricious, nor otherwise contrary to law.

AFFIRMED

APPENDIX B

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 83-8530

HOWARD L. MOON, Plaintiff-Appellant,

vs.

SECRETARY, UNITED STATES DEPARTMENT OF LABOR, Defendant-Appellee,

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(D.C. Docket No. 81-1861)

On Appeal from the United States District Court
for the Northern District of Georgia

Before RONEY and ANDERSON, *Circuit Judges,* and MORGAN, *Senior Circuit Judge.*

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District court for the Northern District of Georgia, and was argued by counsel:

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

If is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: November 26, 1984
For the Court: Spencer D. Mercer, *Clerk*

ISSUED AS MANDATE: DEC. 18, 1984

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

(CIVIL ACTION FILE NO. C81-1861A)

HOWARD L. MOON — Plaintiff

vs.

RAYMOND J. DONOVAN,
Secretary of Labor, — Defendant

ORDER OF COURT

Plaintiff, a handicapped individual, alleges that he was fired by Roadway Express ("Roadway") in violation of Roadway's affirmative action obligation under Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. 793 ("the Act"). In this action, plaintiff contends that defendant has violated its governing regulations and seeks a writ of mandamus to compel the Secretary of Labor ("Secretary") to institute enforcement proceedings against Roadway or to compel enforcement under the Administrative Procedure Act ("APA"), 5 U.S.C. 701, *et seg. See* 41 C.F.R. 60-741.1 to 60-741.54 (1981). The defendant has filed a motion to dismiss or in the alternative for judgment on the pleadings, and plaintiff has filed a cross motion for judgment on the pleadings. Fed.R.Civ.P 12 (b) (6) and 12 (c). The defendant contends that plaintiff lacks standing, that mandamus is inappropriate in this case, and that the Secretary's decision in declining to institute enforcement proceedings against Roadway is an unreviewable exercise of prosecutorial discretion.

Appendix C — Order Dismissing Mandamus

I. Background

Section 503 of the Act provides for affirmative action to employ and advance qualified handicapped individuals.[1] The second part of the Act provides for the basic administrative enforcement:

> If any handicapped individual believes any contractor has failed or refuses to comply with the provisions of his contract with the United States, relating to employment of handicapped individuals, such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.

29 U.S.C. 793 (b). Accordingly, the Department of Labor has promulgated an extensive set of regulations that provide, inter alia, for agency investigation, negotiation, conciliation, and, if necessary, judicial enforcement of agency sanctions. *See* 41 C.F.R. 60-741.1 to 60-741.54 (1981).

After an investigation by the Office of Federal Contract Compliance Programs of the Employment Standards

[1] 29 U.S.C. 793 (a) provides as follows:

> Any contract in excess of $2,500 entered into by any federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 7(6) [29 U.S.C. 706 (6)]. The provisions of this section shall apply to any sub-contract in excess of $2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States. The President shall implement the provision of this section by promulgating regulations within ninety days after the date of enactment of this section

Administration in the U.S. Department of Labor ("OFCCP"), it concluded that the plaintiff was terminated from employment because of his handicapping conditions. After further investigation, the Secretary determined that the case was unsuitable for litigation because of insufficient evidence. The case file was then closed.[2] The plaintiff sued Roadway directly, but the Court of Appeals held that plaintiff did not have a private right of action against the employer under the Act. *Rogers v. Frito-Lay, Inc.* 611 F.2d 1074 (5th Cir. 1980).

II. Standing

Defendant argues that plaintiff lacks standing to maintain this lawsuit. In order to have standing, a plaintiff must "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91, 99 (1979), and that "the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Org.,* 426 U.S. 26, 38, 41 (1976); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* ___ U.S. ___, 102 S.Ct. 752, 758 (1982). Furthermore, the plaintiff must demonstrate that the injury is to an interest arguably within the zone of interests to be protected or regulated by the statute or consti-

[2] In 1981, the Director of the OFCCP reviewed the decision of the Atlanta Regional Office regarding the plaintiff's complaint. It concluded that the Secretary's Office had considered all of the documents on file and the OFCCP concurred with the decision to administratively close the case. Furthermore, the Secretary contends that the OFCCP lacks any authority to overrule the Secretary's exercise of discretion not to prosecute a particular case.

tutional guarantee in question. *Association of Data Processing Service Org., Inc. v. Camp,* 397 U.S. 150, 153, (1969).

In the case *sub judice,* it is clear that the plaintiff has suffered injury in fact. Plaintiff describes his injury as a deprivation of his right to obtain administrative or judicial relief under the Act and its regulations based on his discharge from employment due to his handicap. Moreover, plaintiff's injury is to an interest within the zone of interests protected by the Act and the regulations the defendants are claimed to have violated. The Rehabilitation Act provides for affirmative action in the employment and advancement of handicapped individuals, and for administrative enforcement of the Act where a handicapped individual believes that a federal contractor has violated the affirmative action provisions of the Act. Plaintiff's complaint alleges that plaintiff was fired by Roadway in violation of the affirmative action obligations of the Act. the Regulations applicable to the Act, 41 C.F.R. 60-741.1 to 60-741.54 (1981), provide for investigation, negotiation, conciliation, and judicial enforcement, if necessary. Plaintiff contends that defendants violated these regulations by its agency decision in declining to institute enforcement proceedings against Roadway, thus depriving him of his right to administrative or judicial relief under the Act and its regulations. Section 10 of the APA, 5 U.S.C. 702, confers standing to obtain judicial review of agency action upon a person aggrieved by that agency's decision where such person has proven injury in fact, and has shown that his interest is within the zone of interests protected by the relevant statute. *United States v. Scrap,* 412 U.S. 669, 686, (1973). The court concludes that plaintiff has satisfied both of these requirements, and therefore has standing to maintain this lawsuit.

Appendix C — Order Dismissing Mandamus

III. Jurisdiction

A. The Mandamus Act, 28 U.S.C. 1361, states that the district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff. The plaintiff contends that the Secretary has not followed its own regulations in enforcing the Rehabilitation Act. The regulations state that "in every case where any complaint investigation indicates the existence of a violation of the affirmative action clause . . . the matter should be resolved by informal means, including conciliation, and persuasion." 41 C.F.R. 60-741.28 (other remedies include judicial enforcement, withholding progress payments, termination or debarment). However, three elements must exist before mandamus can issue: (1) the plaintiff must have a clear right to the relief, (2) the defendant must have a clear duty to act, and (3) no other adequate remedy must be available. *Jones v. Alexander,* 609 F.2d 778, 781, (5th Cir.), *cert. denied,* 449 U.S. 832 (1980). The burden of proof is on the party seeking mandamus. *In re Corrugated Container Antitrust Litigation v. Mead Corp.,* 614 F.2d 958, 962 (5th Cir.), *cert. denied,* 449 U.S. 888 (1980).

In the case at bar, the plaintiff does not have a clear right to relief. The record indicates that the Secretary exercised his initial nondiscretionary duty by investigating the claim and notifying plaintiff of his decision not to initiate administrative or legal proceedings against Roadway. *See* 41 C.F.R. 60-741.26 (g) (1) (1981).[3] The plaintiff describes his

[3] However, *see* 41 C.F.R. 60-741.28 where the regulations state in part that "in every case where any complaint investigation *indicates* the existence of a violation of the affirmative action clause of these regulations, the matter *should* be resolved by informal means, including conciliation, and persuasion, whenever possible.

injury in part as an inability to obtain administrative or judicial relief under the Act and its regulations. According to the regulations, the Secretary has the discretion not to initiate administrative or legal proceedings. *See* 41 C.F.R. 60-741.26 (g) (1) (1981). Since a writ of mandamus cannot compel a discretionary action, the plaintiff cannot sustain his burden of proof. *Einhorn v. DeWitt,* 618 F.2d 347, 349 (5th Cir. 1980). Accordingly, plaintiff lacks jurisdiction under the Mandamus Act, 28 U.S.C. 1361.

B. The plaintiff contends that under the Act, the Secretary was required to institute enforcement proceedings against Roadway. The Secretary states that his decision to forego further legal actions on plaintiff's complaint is an unreviewable exercise of discretion. According to the APA, judicial review will be afforded, except to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law. 5 U.S.C. 701 (a). In the absence of an express prohibition in the Act, the Secretary "bears the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of his decision." *Dunlop v. Bachowski,* 421 U.S. 560 (1975). "Only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories v. Gardner,* 387 U.S. 136, 141 (1967). *See also, Citizens to Preserve Overton Park, Inc. v. Vople,* 401 U.S. 402, 410 (1971); *Chevron Oil Co. v. Andrews,* 588 F.2d 1388 (5th Cir. 1979). Thus, the Supreme Court has stated in strong terms that the exemption from APA review of action "committed to agency discretion" is a very narrow exception. *Citizens to Preserve Overton Park, Inc., supra.* The exception app-

lies only in those rare instances where "statutes are drawn in such broad terms that in a given case there is no law to apply." *Id.* That a statute by its terms permits, rather than compels, agency actions does not alone commit that action to the agency's unreviewable discretion. *Save the Bay, Inc. v. Administrator of E.P.A.*, 556 F.2d 1282, 1293 (5th Cir. 1977).

Not every refusal by a government official to take action to enforce a statute is unreviewable.[4] Courts have discussed the most pertinent analysis to be used when faced with the question of reviewability of prosecutorial discretion. "The doctrine of prosecutorial discretion should be limited to those civil cases, which like criminal prosecutions, involve the vindication of societal or governmental interests, rather than the protection of individual rights." *Bachowski v. Brennan*, 502 F.2d 79 (3rd. Cir. 1974), cited with approval in *Dunlop v. Bachowski*, 421 U.S. at 567, n.7. The Court in *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1079-1080 (5th Cir. 1980), mentioned in dicta that under the Act the handicapped may have simply the right to petition those who administer federal contracts to perform their duty. The *Rogers* Court was determining whether the plaintiff had a direct cause of action under the principles enunciated in *Cort v. Ash*, 422 U.S 66 (1975). Thus, the *Rogers* Court did

[4] In *Bullard v. Webster*, 623 F.2d 1042 (5th Cir. 1980), an FBI agent brought an action for injunctive relief challenging his lateral transfer from Mississippi to New Jersey. The court held that the protection of the APA [judicial review] were not applicable to the agent. In suggesting criteria, the Court looked at the legislative scheme as well as the practical and policy implication; the feasibility of judicial review versus the potential for disruption of the administrative process, the broad discretion given an agency in a particular area of operation; the extent to which the challenged action is the product of political, economic or managerial choices that are inherently not subject to judicial review; and the extent to which the challenged action is based on some special knowledge of expertise.

not decide whether the Act was for the protection of the individual for purposes of determining whether the Court had authority to review the Secretary's action for abuse of discretion.[5]

The legislative history of the Act demonstrates a deep concern over the plight of the handicapped, as well as the vindication of societal interests. Thus, in seeking to remedy violations of the Act, the Secretary acts largely on behalf of those individuals whose rights have been infringed. If the Court were to conclude that the Secretary's discretion was unreviewable, then an abuse of discretion through refusal to administer the enforcement mechanisms might leave a handicapped person without a remedy and/or render the Act meaningless.[7]

Since the exception to judicial review of an administrative action is very narrow, and the defendant has not shown by clear and convincing evidence that the legislative intent was to restrict access for review, the court con-

[5] In *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277, 1285-86 (7th Cir. 1977), the Court discussed Section 504 of the Act and noted it may be contemplated that judicial review of an administrative proceeding would be "contradistinct from an independent cause of action in federal court."

[6] An examination of the legislative history reveals beyond a doubt that protection of handicapped individuals from discrimination was a primary purpose of the legislation. "The primary goal of this bill is to assist handicapped individuals in achieving their full potential for participation in our society . . . " 119 Cong. Rec. 24589 (1973) (Sen. Dole). *See* 118 Cong. Rec. 32310 (19172) (Sen. Humphrey); 119 Cong. Rec. 635 (1973) (Id.); 119 Cong. Rec. 24566 (1973) (Sen. Cranston); 119 Cong. Rec. 24587 (1973) (Sen. Taft); 119 Cong. Rec. 24587-8 (1973) (Sen. Williams).

[7] If the Secretary concludes that some action is called for, the regulations do not mandate an action to reinstate the terminated handicapped individual. The Secretary may opt to withhold progress payments, terminate the contract or debar the contractor or subcontractor from reviewing future contracts for failure to comply with the provisions of the affirmative action clause. *See* 41 C.F.R. 60-741.28 (1981).

cludes that the plaintiff has a right to judicial review in the case *sub judice.* However, the Secretary's decision not to invoke the enforcement mechanisms is to be reviewed under the limited standard of "abuse of discretion."[8] 5 U.S.C. 706 (2) (A).

IV. Oral Argument on Pending Motions

The plaintiff has the burden of proof to show why the agency's action was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law. The "arbitrary and capricious" standard is narrow and permits a reviewing court merely to consider whether the agency decision was based on the relevant factors and whether there has been a clear error of judgment. *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416 (1971); *Sumter Dairy v. Block,* 666 F.2d 158 (5th Cir. 1982). Section 706 (2) (A) does not authorize a trial-type hearing into the factual basis of the Secretary's decision. *Dunlop, supra* at 566. The Secretary contends that the findings and decision to refrain from enforcement proceedings are not arbitrary and capricious. Both parties have submitted exhibits to this court. Since matters outside the pleadings were presented to and will not be excluded by the court, the defendant's motion to dismiss will be treated as one for summary judgment. *See* Fed.R.Civ.P. 12 (b). Furthermore, both parties' motion for judgment on the pleadings will be converted to a motion for summary judgment. Rule 12 (b) and 12 (c) provide that if a motion is to be treated as one for summary judgement, "all parties shall be given reasonable opportun-

[8] Review under the substantial evidence test is authorized only when the agency action is taken pursuant to a rule-making provision of the APA or when the agency action is based on a public adjudicatory hearing. *Sumter Dairy v. Block,* 666 F.2d 158 (5th Cir. 1982).

ity to present all materials made pertinent to such a motion by Rule 56." Fed.R.Civ.P. 12(b) and 12(c). Accordingly, oral arguments will be heard on whether the Secretary abused his discretion in determining that the evidence was insufficient to warrant any further action on the part of the Department of Labor. Oral argument is set for November 4, 1982, at 10:00 a.m. Each party will be allowed a maximum of forty-five (45) minutes to present its case. The parties will also be allowed to submit briefs in support of their respective positions up to the time of the hearing.

In sum, defendant's motion to dismiss concerning mandamus is GRANTED, and all other motions will be treated as one for summary judgment.

SO ORDERED, this 30th day of September, 1982.

HORACE T. WARD
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

(Civil Action File No. C81-1861A)

HOWARD L. MOON — Plaintiff

vs.

RAYMOND J. DONAVAN,
Secretary of Labor, — Defendant

ORDER OF COURT

Plaintiff, a handicapped individual, alleges that he was fired by Roadway Express (hereinafter "Roadway") in violation of Roadway's affirmative action obligation under 503 of the Rehabilitation Act of 1973, 29 U.S.C. 793 (hereinafter "The Act"). In this action, plaintiff contends that defendant violated its governing regulations by failing to institute enforcement proceedings against Roadway.

The parties filed cross motions for judgment on the pleadings which were converted into motions for summary judgment pursuant to Fed.R.Civ.P. 12 (c). By Order of September 30, 1982, this court held that plaintiff had standing to bring this action, that plaintiff was not entitled to a writ of mandamus to compel defendant to institute enforcement proceedings against Roadway, and that the Secretary's decision was subject to judicial review under the limited standard of "abuse of discretion."

On November 4, 1982, a hearing was held before the court at which time counsel for the parties presented oral argu-

ment on the issue of whether the Secretary abused his discretion in determining that the evidence in plaintiff's case against Roadway was insufficient to warrant any further action by the Department of Labor. This matter is now before the court on the parties' cross motions for summary judgment with respect to this issue.

Based on the oral argument of the parties, the briefs, and the other documents in the record, the court makes the following:

FINDINGS OF FACT

Plaintiff began to work for Roadway in 1969 and voluntarily resigned in 1971. He was rehired the following year and was made Terminal Manager of Roadway's Griffin Terminal, Griffin, Ga., in August 1973. Plaintiff sustained his handicap in an automobile accident in August 1974, and returned to this duties as Terminal Manager in June 1975. He was terminated by Roadway on February 18, 1977.

On April 5, 1977, plaintiff filed an administrative complaint with the Office of Federal Contract Compliance Program (hereinafter "OFCCP") of the Department of Labor against Roadway and Hemingway Transports, Inc. alleging that he was fired because of his handicap. The OFCCP investigated the charge and in May 1978 concluded that Roadway had violated its affirmative action obligations by firing the plaintiff. On June 22, 1978, the case was referred to the Solicitor of Labor for a legal opinion and/or appropriate legal action in accordance with the enforcement procedures implementing Section 503 of the Act. Five days later, a meeting for the purpose of conciliation was held, at which the contractor, the plaintiff, the EOS, and their respective

attorneys were present. Resolution by informal means failed.

In January 1979, based on an analysis of the evidence before it, the Solicitor's Office concluded that the case was not suitable for further legal action.

During the next two months, representatives of the Solicitor's Office met with plaintiff and his counsel and considered further submissions. In August 1979, the Office of the Solicitor reaffirmed its decision that the case was not suitable for further action. Plaintiff was notified of this decision by the OFCCP and was told that he could seek reconsideration. Plaintiff did request that the Director of OFCCP reconsider the Solicitor's decision to close his case. The Director of OFCCP reviewed plaintiff's file and concurred with the Solicitor's decision that the case was not suitable for legal action. After plaintiff was notified that his case had been closed, he filed this lawsuit to compel the Secretary to institute enforcement proceedings against Roadway.

CONCLUSION OF LAW

Section 503 of the Act requires covered federal contracts to include a provision which provides that the contractor will take affirmative action in the employment of handicapped individuals.[1] The second part of the Act provides for the basic administrative enforcement:

[1] 29 U.S.C. 793 (a) provides as follows:

Any contract in excess of $2,500 entered into by any federal department or agency for the procurement of personal property and nonpersonal service (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 7 (6) [29 U.S.C. 706 (6)]. The provisions of this section shall apply to any subcontract

(Footnote continued on following page.)

> If any handicapped individual believes any contractor has failed or refuses to comply with the provisions of his contract with the United States, relating to employment of handicapped individuals, such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.

29 U.S.C. 793 (b). Accordingly, the Department of Labor promulgated a set of regulations that provide, inter alia, for agency investigation, negotiation, conciliation, and if necessary, judicial enforcement of agency sanctions. *See* 41 C.F.R. 60-741.1 to 60-741.54 (1981).

Under these regulations implementing Section 503, the Director of the OFCCP is charged with the primary responsibility for investigating complaints of discrimination. 41 C.F.R. 60-741.25. If the complaint investigation indicates the existence of a violation of the affirmative action clause or the regulations, the Director or agency must attempt to resolve the matter by informal means, such as conciliation and persuasion. If the agency cannot secure complaince through informal resolution, the OFCCP is required to proceed with enforcement procedures provided by these regulations.[2] 41 C.F.R. 60-741.28 (a).

(Footnote continued from preceding page.)

in excess of $2,500 entered into by a prime contractor in carrying ut any contract for the procurement of personal property and nonpersonal services (including construction) for the United States. The President shall implement the provisions of this section by promulgating regulations within ninety days after the date of enactment of this section.

[2] Whenever an investigation indicates noncompliance, the contractor becomes entitled to a hearing in accordance with 41 C.F.R. 60-741.29. *See* 41 C.F.R. 60-741.26 (g) (3). Section 60-741.29 (b) (1) of Title 41, C.F.R., provides that all

(Footnote continued on next page)

Plaintiff contends that the defendant failed to follow its own regulations in that the Regulations state that the Director, and not the Solicitor, makes the determination as to whether there is a violation. Defendant, to the contrary, argues that it has not violated its regulations and that the Solicitor, pursuant to 41 C.F.R. 60-30.5 (a), is authorized to institute enforcement proceedings upon referral by the OFCCP.

The record shows that the OFCCP initially concluded that the contractor terminated the plaintiff based on his handicap. The OFCCP then referred the case to the Solicitor for a legal opinion and/or to institute enforcement proceedings. Upon further investigation, the Solicitor concluded that there was insufficient evidence to conclude that plaintiff was terminated because of his handicap. The Solicitor then closed plaintiff's file. The OFCCP, in concurring with the Solicitor, notified the plaintiff of this decision.

It appears that the essence of plaintiff's argument is that the Solicitor reviewed the OFCCP decision of discrimination and reversed it, and that the Solicitor had no authority to review and reverse the OFCCP decision. Plaintiff argues that the Director of OFCCP, pursuant to the regulations, is responsible for making the decision as to the existence or nonexistence of a violation.

(Footnote continued from preceding page.)

hearings conducted under regulations implementing the Act shall be governed by the rules set forth in 41 C.F.R., Part 60-30. Under that part,

> (t)he Solicitor of Labor, Associate Solicitor for Labor Relations and Civil Rights Regional Solicitors and Regional Attorney upon referral from the Office of Federal Contract Complaince Programs, are authorized to institute enforcement proceedings by filing a complaint . . . .

41 C F.R. 60-30.5 (a).

The regulations provide that where it is indicated that there is a violation of the affirmative action clause, the Director shall refer the case to the Solicitor to commence enforcement procedures if informal resolution fails. Generally, the law gives agencies wide discretion "to determine the means of administration of pertinent regulatory standards, the techniques of interpretation, application, filling in of details, and enforcement." *Porter County Chapter v. Nuclear Regulatory Commission*, 606 F.2d 1363, 1369 (D.C. Cir. 1979). Thus, while the Solicitor is authorized to enforce proceedings, he may properly undertake any inquiries in order to determine whether the claim is substantial enough under the statute to warrant the commencement of enforcement proceedings. "There remains in the Solicitor a degree of discretion to select cases and it is his subjective judgment as to the probable outcome of any legal action which must control." *Dunlop v. Bachowski*, 421 U.S. 560, 572, (1975).

In the case *sub judice*, the Secretary listed his reasons for refusing to begin enforcement proceedings. The Secretary determined that there was insufficient evidence to conclude that plaintiff was terminated because of his handicap, but rather that the termination was an exercise of management discretion based solely on plaintiff's performance as terminal manager. Based on the evidence, the Secretary concluded that plaintiff's case was unsuitable for any further legal action.

The standard of review of the Secretary's decision is limited to whether the defendant abused his discretion in making the decision not to initiate enforcement proceedings. This court may not substitute its judgment for that of the Secretary, and its review must be confined to an examinaton of the reasons why the defendant refused to com-

mence enforcement proceedings, and whether such decision is so irrational as to constitute an arbitrary and capricious decision. *Dunlop v. Bachowski, supra.*

The court has carefully and thoroughly reviewed the record and the reasons given for the Secretary's decision, and is unable to conclude that the Secretary's decision was arbitrary and capricious. The court finding that defendant did not abuse his discretion in refusing to initiate enforcement proceedings, it is hereby ORDERED that defendant's motion for summary judgment is GRANTED, and plaintiff's motion for summary judgment is DENIED. This action is DISMISSED.

SO ORDERED, this 6th day of June, 1983.

HORACE T. WARD
United States District Judge

APPENDIX E

DOCUMENTATION OF OFCCP INVESTIGATION

May 10, 1978

Investigator: EOS Eugene C. Maner (Signed and Dated May 11, 1978)

Name of Complainant: Howard L. Moon, 1407 Cabin Creek Trail, Griffin, Georgia 30223.

Name of Contractor: Roadway Express Inc. 2701 Moreland Avenue, Atlanta, Georgia.

Coverage:

1. Contract with Department of Army GBL No. M3874763, March 22, 1977, dollar amount $2,668.77, tariff ref Roadway Express ICC 1889.

2. Compilation of Bills of Ladings:
Tender No. 1376, Jan.-Feb.77, dollar amount $3,328.65
Tender No. 1530, Jun-Nov.77, dollar amount $25,105.52

Recommendation

Violation: Back pay cumulative for the period February 18, 1978 - $28,562.00, plus average stock plan $2,541.00. Reinstatement and lost benefits.

Complaint Data

Complainant is an amputee, left leg above the knee, from auto accident August 3, 1974. Complainant ambulates with use of solid ankle cushion-heel, hydralic knee artificial limb.

Evidence/Rationale for Recommendation

Complainant alleged that he was terminated from employment on February 18, 1977 because of his handicapping condition, amputation of the left leg above the knee.

Contractor's position is that the complainant was not the calibre of person the contractor needs to build a management organization on. Contractor further stated that complainant's attitude toward his job and the company had soured. Contractor feels that a reasonable accomodation has been made to the complainant through a reduction of his sales quota and through supplying a sales representative to assist the complainant at the Griffin terminal.

Investigation by this Department revealed that the complainant was employed with the contractor as a terminal manager at the Griffin, Georgia location. The complainant was involved in an automobile accident in August 1974, which caused him to have a left leg amputated above the knee. The complainant was out of work for ten months recuperating and learning to ambulate with the use of a prosthesis. During the period complainant was out, the Griffin terminal was operated by H.M. Patterson. On June 9, 1975, the complainant was reinstated as terminal manager by the District Manager, N. T. Faires. Complainant reportedly operated the Griffin terminal under N. T. Faires until Mr. Faires was terminated in November 1976, and subsequently Tom Addison who approved his dismissal on February 18, 1977.

Further investigation revealed that the complainant was promoted to the terminal manager position in August 1973 from the position of dock foreman/dispatcher. Information submitted by the complainant on January 24, 1978 to this investigator shows that the Griffin terminal operating at least adequately compared to others in the District.

An on-site investigation was conducted by this investigator on March 3, 1978 at the contractor's location in Atlanta,

where records are kept for the Southeast District. Concensus of contractor's manager was that the complainant was not operating Griffin terminal efficiently. Results of the meeting was that the contractor be allowed to submit an amended response statement. Interview with Dick Hoss, Vice President of Roadway, indicated he felt that complainant's attitude had soured after his accident and return to work and that he believed that a sizeable monetary settlement had deteriorated the complainant's attitude toward his job.

On April 7, 1978, this office received from the contractor's attorneys amended response statement and attachments. Review of contractor's statement and materials indicate that the contractor felt that complainant's performance as terminal manager was less effective than successor as terminal manager in such area as sales, maintenance of rolling stock and the terminal itself. The statement also said that there were serious personnel problems at the terminal while the complainant was in charge. Reviews of terminal sales performance trends show no significant change when comparing complainant's and successor's performance in overall categories. Contractor's amended statement concludes with the statement that "surely reasonable accommodation does not require a company to institute a personnel decision which it believes will lead to the harming of its business interest. We believe that a demotion or transfer of Mr. Moon would have created such harm and is not reasonable here."

On April 27, 1978, interview with Mr. N. T. Faires revealed that the complainant performed duties of terminal manager adequately after return to job with one leg. Inter-

viewee also stated that he believes the decision to fire complainant was made because of his handicapping condition.

Based on the findings of this investigation, there is sufficient evidence to conclude that the contractor violated its affirmative action obligation by terminating the complainant from employment without making a reasonable accommodation. More specifically, the contractor had an obligation to transfer or demote the complainant to another position within his qualifications rather than terminate him because of his alleged attitudinal problem. Further, the complainant, in my opinion, did demonstrate that he could perform the duties as a terminal manager within his physical limitations. For this reason, it is my opinion that the contractor has violated its affirmative action obligation under Section 503 of the Rehabilitation Act of 1973, as amended.

Reviewed
(X) I concur
( ) I do not concur
s/W.F. Melton, *Regional Coordinator* Dated 5/15/78

(X) I concur
( ) I do not concur
s/Jodie G. Eggers, Dated 5/15/78
ARA, OFCCP/ESA, Region IV

APPENDIX F

Howard L. Moon — COMPLAINANT
1407 Cabin Creek Trail
Griffin, Ga. 30223

020

Roadway Express Company — CONTRACTOR
2701 Moreland Avenue
Atlanta, Ga. 30315

NOTIFICATION OF RESULTS OF INVESTIGATION

An investigation by the Office of Federal Contract Compliance Programs of the Employment Standards Administration in the U.S. Department of Labor, of the allegations made in the compliant of Howard L. Moon, filed on April 5, 1977 has resulted in the following findings:

The said employer is a contractor and the complainant is a handicapped person within the meaning of Section 503 of the Rehabilitation Act of 1973, as amended.

The complainant alleges that the contractor violated its obligations under the affirmative action provision of its Federal contract by terminating him from employment on February 18, 1977, due to his handicapping condition, a left leg amputation that causes him to use a prosthesis in order to ambulate.

The contractor's position is that the complainant was terminated because he was not the calibre of person the contractor needs to build a management organization on, and because the complainant's attitude toward the company and his job had soured. The contractor further stated that reasonable accommodations were made to the complainant by allowing him to return to employment after his leg amputation.

Appendix F — Notification of Results of Investigation

Investigation by this Department indicated that the contractor terminated the complainant from employment because of his handicapping condition although the complainant continually demonstrated that he could perform the duties of Terminal Manager. The contractor has refused to reasonably accommodate the complainant with employment, and has therefore violated its obligation under the affirmative action provisions.

In accordance with the regulations for the handicapped persons program (60 CFR Section 741.26(a), the Department now invites Roadway Express Company to join with it to resolve this matter through conciliation by informal means. An investigator from this office will be in contact with Roadway Express Company within ten (10) days to begin the conciliation process.

On behalf of the United States Department of Labor

/s/JODIE G. EGGERS Dated May 15/78
ESA Assistant Regional Administrator
for OFCCP

APPENDIX G

U. S. DEPARTMENT OF LABOR
OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS
ATLANTA, GEORGIA

DATE: June 22, 1978
REPLY TO Jodie G. Eggers
ATTN OF: ARA/OFCCP/ESA

SUBJECT: Moon v. Roadway Express Co.

To: Regional SOL

The subject investigation report and/or correspondence is submitted herewith for the designated action:

Legal Action	Legal Opinion
___X___ Section 503	___X___ Section 503
___X___ Section 402	___X___ Section 402
_____ Other (specify)	_____ Other (specify)

COMMENTS:

The subject case file (3 folders) is forwarded for your review as per conversation between Walt Melton, Jim Woodson and Glenn Embree. Roadway and their attorney, Moon and his attorney, and Melton will meet on Tuesday, June 27, 1978 to attempt a conciliated settlement of the complaint. It is my understanding that Glen Embree will represent your office at this meeting. Your cooperation in providing the services of one of your attorneys in this matter is appreciated. The case file consists of three folders.

Enclosure (3 folders)

APPENDIX H

October 3, 1979
SOL Case No. 04069
Moon v. Roadway Express, Inc.

To: Mr. Donald G. Webster
ARA for OFCCP

Subject file was referred for consideration of a 503, Vocational Rehabilitation Act.

As indicated in Mr. Embree's analysis and supplemental analysis, we do not believe that the evidence compiled in this file and by our investigation is sufficient to support legal action in this case, and, are therefore, closing our file on this matter.

If, however, you feel that some service may be rendered Mr. Moon through further conciliation, we would not discourage further conciliation on your part, as the evidence does tend to indicate that the company acted unwisely in terminating a long term employee because of his effort to communicate to his superiors that a newly initiated sales program was unworkable, and the subsequent termination of such superiors tends to indicate that Mr. Moon was right.

BOBBYE D. SPEARS
Regional Solicitor

By: James H. Woodson
Council for Employment Standards

RS:GME:krd

APPENDIX I

Nov 6, 1979
Mr. Walter F. Melton
Regional Coordinator
Handicapped Worker Program
U. S. Department of Labor
Office of Federal Contract Compliance
1371 Peachtree Street, N. E.
Room 729
Atlanta, GA 30309

Re: Howard L. Moon

Dear Mr. Melton:

This letter is in response to our telephone conversation of this week regarding conciliation of the above-entitled matter. You stated to me on the telephone that this matter had been sent back to you by the Solicitor's Office of the Department of Labor for conciliation due to the fact that they did not think that the file was suitable for advancement to hearing for whatever internal reasons they have themselves. I would note that I have discussed this case with Mr. Embry and he felt that it did not call for probable cause finding that he himself was of the view point that this claim should not be advanced to hearing. On this basis, you contacted me regarding a possible conciliation.

As I told you on the telephone, I would request this matter be sent to the Washington office of the OFCCP for a redetermination of the probable cause finding prior to any conciliation being undertaken by the parties. I feel that this is proper in light of the procedural twists this case has taken to the present time.

Appendix I — Letter to OFCCP (Conciliation Attempt)

I await that determination by the Washington office. I remain,

Very truly yours,
/s/John N. Childs,
(Attorney for Contractor)

JNC:sh
CC: Mr. W. F. Klug

APPENDIX J

1371 Peachtree Street, N. E.
Suite 729
Atlanta, Georgia 30309

Nov. 7, 1979

Mr. Howard L. Moon
1407 Cabin Creek Trail
Griffin, Georgia 30223

Dear Mr. Moon:

This is written in reference to your complaint filed under Section 503 of the Rehabilitation Act of 1973 against Roadway Express, Inc.

As previously explained to you, your complaint case file was forwarded to our Regional Solicitor's Office for their review and appropriate legal action.

The complaint file has been returned and the Solicitor's Office has advised us that they will take no further action of your complaint. Therefore, we are administratively closing it.

As set forth in 41 CFR 60-741.26(g), the Director of the Office of Federal Contract Compliance Programs may, for reasonable cause, reconsider or order the reconsideration of this determination. If you desire reconsideration you should address a written request to Director, OFCCP, U. S. Department of Labor, 200 Constitution Avenue, N. W., Washington, D. C. 20210. Such a request should be accompanied by affidavits, signed testimony of supervisory or fellow workers, or other written documentation that would substantially alter our findings in this case.

Appendix J — Letter from Regional OFCCP Closing File

We regret that we cannot be of further assistance to you in this matter.

Sincerely,

DONALD G. WEBSTER
Assistant Regional Administrator
OFCCP/ESA
Melton/rbh/10/18/79
CC: Kirby

APPENDIX K

July 24, 1981

MEMORANDUM FOR: ELLEN M SHONG
Director

THRU: JOSEPH M. HOGAN
Acting Director,
Division of Enforcement Coordination

FROM: RICHARD S. BALDAU
Director, Task Force on 503/402
Complaint Appeals

SUBJECT: Howard L. Moon vs. Roadway Express

Case Analysis

A. *Facts*

The complainant filed his handicap discrimination complaint with the OFCCP on April 5, 1977. The complaint was investigated by the Atlanta Regional Office, and on May 10, 1978, the Regional Office concluded there was sufficient evidence to show that: "the contractor violated its affirmative action obligation by terminating the complainant from employment without making a reasonable accommodation."

Having thus found the contractor in violation, the Regional Office so informed the contractor via its *Notification of Results of Investigation* letter dated May 15, 1978, and invited the contractor to "resolve the matter through conciliation by informal means."

A meeting for the purpose of conciliation was held on June 27, 1978. In attendance were the contractor with attorneys; the complainant and his attorney; the EOS with an attorney from the Solicitor's Office. The contractor's attorneys

did not want to discuss remedies (i.e., reinstatement, back wages, etc.) because of the pending legal actions taken against the contractor by the complainant (right of private action).

Five days before the June 27th meeting, the case file was referred to the Regional SOL for a legal opinion and/or legal action. On January 31, 1979, the Regional SOL advised the Assistant Regional Administrator (ARA) that the case was "rejected for litigation (since) we cannot conclude that Mr. Moon's termination was because of his handicap...rather than an exercise of management discretion based solely on his performance as terminal manager."

The ARA, on November 7, 1979, informed the complainant by registered letter that because of the Solicitor's action the case was being administratively closed and that he, the complainant, had 30 days in which to petition the Director, OFCCP, for a review of his case. On December 6, 1979, the complainant appealed to the Director for relief.

In February 1980, having received the complainant's case file from the Regional Office, it was apparent to the National Office, after reviewing its contents, the file was incomplete. This was confirmed later when the complainant on May 14, 1980, at a meeting held at the National Office with the Associate Solicitor, the Division Director, the Branch Chief and the Senior EOS, complained that the file on hand was not the complete file which he had previously reviewed at the Regional Office.

The complainant was informed at this meeting that the National Office would request the complete file from the Regional Office; however, he was cautioned that: "...normally the OFCCP cannot review a decision made by the

Solicitor's Office" but that upon reviewing the complete file "if we believe the Regional Solicitor should have accepted your case for enforcement, we will ask that they reconsider their decision. (However), the final decision is in the hands of the Solicitor, all that OFCCP can do is request that the Solicitor enforce an individual case." On that note the meeting was adjourned.

B. *Position*

The complainant's position is that the contractor violated its obligations under the affirmative action provision of its Federal contract by terminating him from employment on February 18, 1977, due to his handicapping condition, a left leg amputation that causes him to use a prosthesis in order to ambulate.

The contractor's position is that the complainant was terminated because he was not the calibre of person the contractor needs to build a management organization on, and because the complainant's attitude toward the company and his job had soured. The contractor further stated that reasonable accommodations were made to the complainant by allowing him to return to employment after his leg amputation.

C. *Issues*

1. Did the Regional Solicitor consider all the evidence in the complainant's case file before overruling the Regional Office request to litigate?

2. Does OFCCP have the authority to require the Solicitor's office to litigate a case in which that office believes to be not suitable for enforcement?

Appendix K — Memo, Director OFCCP ("Case Analysis")

D. *Analysis*

At the May 14, 1980 meeting, the complainant argued, and the National Office acquiesed, that a further review of the complainant's case file is in order in spite of the SOL determination that the case was not suitable for enforcement.

The National Office requested and subsequently received from the Regional Office the complete case file consisting of four volumes.

Upon reviewing the four volumes, it was apparent that the RSOL had rendered its decision after surveying all of the facts contained therein. In addition, any information submitted by the complainant subsequent to the RSOL findings did not present any arguable rebuttals that would have challenged that office's initial determination.

E/F. *Conclusion/Recommendation*

In view of the foregoing, it is concluded that: (1) there are no new argument or documents of a substantive nature submitted by the complainant which have not been previously reviewed and considered by the Solicitor's Office which would cause that office to alter or change its determination; (2) there are no regulations or policy directives which empowers the Director of OFCCP to overrule the prerogative of the Solicitor's Office to determine which case(s) are proper for litigation and/or enforcement. Therefore, it is recommended that the National Office concur with the Regional Office letter of November 7, 1979 informing the complainant that the case is administratively closed because of the Solicitor's Office decision to take no further action on his complaint.

APPENDIX L

July 24, 1981

RETURN RECEIPT REQUESTED

Mr. Howard L. Moon
1407 Cabin Creek Trail
Griffin, Georgia 30223

Dear Mr. Moon:

This is in response to your request for a review by the Director, Office of Federal Contract Compliance Programs, of the decision of the Atlanta Regional Office on your complaint against Roadway Express, Inc. The administrative review has been completed.

Based on the contents of the complete case file, it is concluded that there are no documents or issues that have not been reviewed or considered by the Solicitor of Labor's Office. This office, therefore, concurs with the decision of our Atlanta Regional Office to administratively close your case. We agree with the decision of the regional office of the Solicitor of Labor that Roadway Express did not terminate your employment because of your handicap.

This concludes the Department of Labor's processing of your complaint and exhausts the administrative procedures under Section 503 of the Rehabilitation Act of 1973.

Sincerely,

(Signed) Jack Bluestein

For
Ellen M. Shong
Director
(National Director, OFCCP, Washington, D.C.)

EPEC/Baldau/bcb 7/24/81